# Munusamy a/l Ayeru & Anor v Koperasi Pembangunan Kampung Tradisional Tasek Pulau Pinang Bhd & Anor and other appeals

HIGH COURT (PENANG) — CIVIL APPEAL NOS PA-12ANCC-2–01 OF 2018, PA-12ANCC-3–01 OF 2018 AND PA-12ANCVC-19–09 OF 2017
LIM CHONG FONG J
12 JUNE 2018

*Civil Procedure — Striking out — Appeal against dismissal of striking out application — Sessions court dismissed striking out application — Whether claim liquidated and ascertained damages time barred under the Limitation Act 1953 s 6 — Whether there was no privity of contract between parties — Whether suits ought to be struck out*

These was three striking out appeals that emanated from the sessions court in relation to the claim for liquidated and ascertained damages for late completion of a housing project. The purchasers, on different dates in the second half of 1997 entered into a sale and purchase agreement ('the SPA') respectively with the original developer to purchase a double storey medium cost house at Taman Pekatra, Simpang Ampat, Pulau Pinang. The appellant in Civil Appeal No PA12ANCC-19-09 of 2017 ('Appeal 19') was the original developer and the first defendant in Civil Suit No A52NCC-65–06 of 2016 ('65 Suit') and Civil Suit PB-A52NCVC-02-01 of 2017 ('02 Suit') that were combined together. The second defendant in both suits was the rescue developer. The first and second respondents in Appeal 19 were the purchasers and the plaintiffs in the 65 Suit, while the third and fourth respondent in Appeal 19 were the purchasers and plaintiffs in the 02 Suit. The first and second appellant in Civil Appeal No PA-12ANCC-3-01 of 2018 ('Appeal 3) were the purchasers and plaintiff in Civil Suit No A52NCC-50–05 of 2016 ('50 Suit') and Civil Suit No A52NCC-51-05 of 2016 ('51 Suit') respectively that were combined together. The respondent in Appeal 3 was the original developer and first defendant in the 50 Suit and 51 Suit. The second defendant in both 50 Suit and 51 Suits was the rescue developer. The first and second appellant in Civil Appeal No PA-12ANCC-2-01 of 2018 ('Appeal 2') were the purchasers and plaintiffs in the 50 Suit and 51 Suit respectively. The first respondent in Appeal 2 was the original developer and first defendant in the 50 Suit and 51 Suit while the second respondent was the rescue developer and second defendant in the 50 Suit and 51 Suit. The purchasers filed the 65 Suit, 02 Suit, 50 Suit and 51 Suit ('the suits') respectively to claim for liquidated and ascertained damages for late delivery of their housing units developed by the original developer and

ultimately completed by the rescue developer. The original developer applied to strike out the suits and statement of claim filed thereunder and succeeded in the 50 Suit and 51 Suit but failed in the 65 Suit and 02 Suit. The rescue developer applied and succeeded in striking out both the 50 Suit as well as 51 Suit and the respective statement of claim filed thereunder. As the result, the original developer filed Appeal 19 against the purchasers and the purchasers filed Appeal 2 and Appeal 3 against the rescue and original developer. The original developer contended that the suits were time barred by reason that they were filed beyond the time expiry provided in s 6 of the Limitation Act 1953. The rescue developer adopted the same contention as well as that there was no privity of contract with the purchasers.

**Held**:

(1) This was a question of construction of the contract in issue. On the reading of cll 20(1) and (2) of the SPA, it was plain that only the opening date but not the closing date was specified. The suits which were all filed in 2016–2017 were caught by limitation which expired in 2006. The purchasers ought to have filed their suit once in 2006 before limitation set in for delay damages accrued to that point and further suits after 2011 for the balance of the delay damages, although it might seem cumbersomeg. The purchasers were not under disability at all material times to have commenced their suits by 2006. It was plain and obvious that the suits against the original developer ought to be struck out following the case of *Tan Sri Dato Eric Chia Eng Hock v NKK Corporation (Japan) Corporation* (see paras 28–30).

(2) As for the rescue developer, the purchasers were not able to show by tendering cogent evidence that they respectively entered into a new contract with the rescue developer or that the SPA was novated over the rescue developer. The purchasers could only sue the original developer but not the rescue developer. In the premises, it was obvious that the suit ought to be struck out because of absence of privity of contract between the parties (see paras 31–32).

(3) The purchasers submitted that the doctrine of estoppel ought to be applied to prevent or preclude a litigant from raising the provisions of a statute in answer to a claim against him in circumstances where it would be unjust and inequitable for him to do so. This was fact sensitive and the said doctrine was not applicable here because the original developer had not committed any act akin to constructive or equitable fraud. Based on the law as it stands, the suits were obviously bound to fail (see para 33).

**[Bahasa Malaysia summary**

Ini adalah merupakan tiga rayuan pembatalan daripada mahkamah sesyen berkenaan dengan tuntutan untuk ganti rugi perbubaran dan telah ditentukan

untuk kelewatan persiapan sebuah projek perumahan. Pembeli-pembeli, pada tarikh-tarikh yang berlainan pada separuh kedua tahun 1997, telah masing-masing memasuki perjanjian jual beli ('PJB') dengan pemaju asal untuk membeli sebuah rumah dua tingkat kos sederhana di Taman Pekatra, Simpat Ampat, Pulau Pinang. Perayu dalam Rayuan Sivil No PA12ANCC-19 Tahun 2009 ('Rayuan 19') adalah pemaju asal dan merupakan defendan pertama di dalam kedua-dua Saman Sivil No A52NCC-65-06 Tahun 2016 ('Saman 65') dan Saman Sivil PB-A52NCVC-02-01 Tahun 2017 ('Saman 02') yang telah disatukan. Defendan kedua untuk kedua-dua saman adalah pemaju penyelamat. Reponden-responden pertama dan kedua dalam Rayuan 19 merupakan pembeli-pembeli dan plaintif-plaintif dalam Saman 65, manakala reponden-responden ketiga dan keempat dalam Rayuan 19 merupakan pembeli-pembeli dan plaintif-plaintif dalam Saman 02. Perayu pertama dan perayu kedua di dalam Rayuan Sivil No. PA-12ANCC-3–01 Tahun 2018 ('Rayuan 3') masing-masing merupakan pembeli-pembeli dan plaintif-plaintif dalam Saman Sivil No A52NCC-50–05 Tahun 2016 ('Saman 50') dan Saman Sivil No A52NCC-51–05 Tahun 2016 ('Saman 51') yang telah disatukan. Responden di dalam Rayuan 3 adalah merupakan pemaju asal dan defendan pertama untuk Saman 50 dan Saman 51. Defendan kedua dalam kedua-dua Saman 50 dan Saman 51 adalah pemaju penyelamat. Perayu-perayu pertama dan kedua dalam Rayuan Sivil No PA-12ANCC-2–01 Tahun 2018 ('Rayuan 2') masing-masing merupakan pembeli-pembeli dan plaintif-plaintif dalam Saman 50 dan Saman 51. Responden pertama dalam Rayuan 2 adalah pemaju asal dan merupakan defendan pertama dalam Saman 50 dan Saman 51 manakala responden kedua adalah pemaju penyelamat dan merupakan defendan kedua dalam Saman 50 dan Saman 51. Pembeli-pembeli telah masing-masing memfailkan Saman 65, Saman 02, Saman 50 dan Saman 51 ('saman-saman') untuk menuntut ganti rugi perbubaran dan telah ditentukan untuk kelewatan persiapan projek perumahan mereka yang telah dimajukan oleh pemaju asal dan disiapkan sepenuhnya oleh pemaju penyelamat. Pemaju asal telah memohon untuk pembatalan saman-saman tersebut serta penyataan tuntutannya telah difailkan dan berjaya untuk Saman 50 dan Saman 51 namun gagal untuk Saman 65 dan Saman 02. Pemaju penyelamat telah memohon dan berjaya membatalkan kedua-dua Saman 50 dan Saman 51 serta kedua-dua penyataan tuntutannya. Akibatnya, pemaju asal telah memfailkan Rayuan 19 terhadap pembeli-pembeli dan pembeli-pembeli telah memfailkan Rayuan 2 dan Rayuan 3 terhadap pemaju asal dan pemaju penyelamat. Pemaju asal telah berhujah bahawa saman-saman tersebut telah melebihi masa yang diperuntukkan kerana telah difailkan melebihi tarikh yang dihadkan yang ditetapkan di bawah s 6 Akta Had Masa 1953. Pemaju penyelamat menggunakan hujah yang sama dan berhujah tiada pengetahuan (priviti) kontrak bersama pembeli-pembeli.

**Diputuskan**:

(1) Ini merupakan persoalan taksiran kontrak yang diketengahkan. Berdasarkan klausa 20(1) dan (2) PJB, adalah jelas bahawa tarikh pembukaan, dan bukanlah tarikh penutup, telah ditentukan. saman-saman tersebut kesemua telah difailkan pada 2016–2017 telah melebihi had yang telah ditetapkan iaitu pada 2006. Pembeli-pembeli sepatutnya memfailkan saman mereka pada 2006 sebelum had masa yang ditetapkan untuk ganti rugi kelewatan terkumpul pada masa itu dan kemudiannya memfailkan saman pada 2011 untuk baki ganti rugi kelewatan walaupun ini kelihatan seperti sesuatu yang menyusahkan mereka. Pembeli-pembeli tidak di bawah ketidakupayaan sepanjang masa material untuk memulakan saman mereka pada 2006. Ia adalah jelas bahawa saman-saman terhadap pemaju asal sepatutnya dibatalkan berdasarkan kes *Tan Sri Dato Eric Chia Eng Hock v NKK Corporation (Japan) Corporation* (lihat perenggan 28–30).

(2) Untuk pemaju penyelamat, pembeli-pembeli tidak dapat menunjukkan dengan memberikan bukti yang menyakinkan bahawa mereka telah memasuki kontrak yang baharu bersama pemaju penyelamat atau SPA telah dinovate kepada pemaju penyelamat. Pembeli-pembeli hanya boleh menyaman pemaju asal tetapi bukan pemaju penyelamat. Oleh itu, ia jelas bahawa saman tersebut sepatutnya dibatalkan atas alasan tiada priviti kontrak di antara pihak-pihak berkaitan (lihat perenggan 31–32)

(3) Pembeli-pembeli telah berhujah bahawa doktrin estoppel adalah sepatutnya terpakai untuk menghalang atau mencegah pendakwa daripada menggunakan peruntukan undang-undang untuk menjawab tuntutan terhadapnya dalam situasi di mana adalah tidak adil dan tidak saksama untuk dia berbuat demikian. Ini adalah fakta yang sensitif dan doktrin tersebut tidak terpakai kerana pemaju asal tidak terlibat terhadap frod konstruktif atau equiti. Berdasarkan undang-undang sedia ada, saman-saman tersebut secara jelasnya dilihat akan gagal (lihat perenggan 33).]

**Cases referred to**

*Abdul Aziz bin Abdul Hamid dan 26 orang lain v Perak Roadways Berhad* [2006] MLJU 481, HC (refd)

*Abdul Raouf Ab Rahman & Ors v Petplus (M) Sdn Bhd & Ors* [2013] 1 LNS 1314, CA (refd)

*Bandar Builders Sdn Bhd v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

*Boo Are Ngor (p) v Chua Mee Liang (p) (sued as public officer of Kim Leng Tze Temple)* [2009] 6 MLJ 145; [2009] 6 CLJ 617, FC (refd)

*Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293, CA (refd)

*Faber Union Sdn Bhd v Goodaim Realty Sdn Bhd* [2010] MLJU 608, HC (refd)

*Golden Approach Sdn Bhd v Lau Sen Leong & Anor* [2019] 3 MLJ 777; [2018] AMEJ 0342, CA (refd)

*Insun Development Sdn Bhd v Azli bin Bakar* [1996] 2 MLJ 188, FC (refd)
*Kamarul Ariffin Jait & Ors v Zuraini Osman* [2016] MLRHU1 (distd)
*Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim* [2013] 4 MLJ 173; [2013] 6 CLJ 849, CA (refd)
*Nasri v Mesah* [1971] 1 MLJ 32, FC (refd)
*Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113; [1995] 2 MLRA 461, FC (refd)
*Perbadanan Kemajuan Negeri Perak v Rama Rao a/l Ramasamy @ Ramaiah* [2011] MLJU 1287, HC (refd)
*Tan Sri Dato' Eric Chia Eng Hock v NKK Corporation (Japan)* [2004] MLJU 293; [2004] 7 CLJ 137, HC (refd)
*Tenaga National Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749, FC (refd)
*Veeriyah a/l Gothandabani v Majestic Heights Sdn Bhd (in liquidation) & Ors* [2017] MLJU 1148; [2017] 1 LNS 1158, HC (refd)
*Woolley Development Sdn Bhd v Tiara Contours Construction Sdn Bhd* [2015] MLJU 1288; [2016] 2 CLJ 610, CA (refd)

**Legislation referred to**

Limitation Act 1953 s 6
Rules of Court 2012 O 18 r 19, O 55 rr 2, 5

*Mehgala a/p A Murugaia (Archana Chandrasekaran with her) (Mehgala & Company) Civil Appeal Nos PA-12ANCC-2–01 of 2018 and PA-12ANCC-3–01 of 2018 for the appellant.*
*Nicholas Tan (Lee Hoay Yin with him) (Lim Huck Aik & Co) in Civil Appeal No PA-12ANCVC-19–09 of 2017 for the appellant.*
*Mehgala a/p A Murugaia (Archana Chandrasekaran with her) (Mehgala & Company) in Civil Appeal No PA-12ANCVC-19–09 of 2017 for the respondents.*
*Nicholas Tan (Lee Hoay Yin with him) (Lim Huck Aik & Co) in Civil Appeal Nos PA-12ANCC-2–01 of 2018 and PA-12ANCC-3–01 of 2018 for the first respondent.*
*Koek Wen Jing (Phee, Chen & Ung) in Civil Appeal Nos PA-12ANCC-2–01 of 2018 and PA-12ANCC-3–01 of 2018 for the second respondent.*

**Lim Chong Fong J:**

INTRODUCTION

**[1]** These are three striking out appeals that emanated from the Butterworth Sessions Courts in relation to the claim for liquidated and ascertained damages for late completion of a housing project.

**[2]** The appellant in Civil Appeal No PA12ANCC-19–09 of 2017 ('Appeal 19') is the original developer and first defendant in Butterworth Sessions Court

A Civil Suit No A52NCC-65–06 of 2016 ('65 Suit') and Civil Suit PB-A52NCVC-02-01/2017 ('02 Suit') that were combined together. The second defendant in both suits is the rescue developer.

B **[3]** The first and second respondents in Appeal 19 are the purchasers and plaintiffs in the 65 Suit while the third and fourth respondents in Appeal 19 are the purchasers and plaintiffs in the 02 Suit.

C **[4]** The first appellant and second appellant in Civil Appeal No PA-12ANCC-3–01 of 2018 ('Appeal 3') are the purchasers and plaintiffs in Butterworth Sessions Court Civil Suit No A52NCC-50–05 of 2016 ('50 Suit') and Civil Suit No A52NCC-51–05 of 2016 ('51 Suit') respectively that were combined together.

D **[5]** The respondent in Appeal 3 is the original developer and first defendant in the 50 Suit and 51 Suit. The second defendant in both the suits is the rescue developer.

E **[6]** The first appellant and second appellant in Civil Appeal No PA-12ANCC-2–01 of 2018 ('Appeal 2') are the purchasers and plaintiffs in the 50 Suit and 51 Suit respectively that were combined together.

F **[7]** The first respondent in Appeal 2 is the original developer and first defendant in the 50 Suit and 51 Suit while the second respondent is the rescue developer and second defendant in the 50 Suit and 51 Suit.

**[8]** For convenience, the parties will be addressed herein as the purchaser(s), original developer and rescue developer.

G **[9]** The purchasers filed the 65 Suit, 02 Suit, 50 Suit and 51 Suit ('suits') respectively to claim for liquidated and ascertained damages for late delivery of their housing units developed by the original developer and ultimately completed by the rescue developer.

H **[10]** The original developer applied to strike out the suits and statement of claim filed thereunder and succeeded in the 50 Suit and 51 Suit but failed in the 65 Suit and 02 Suit. Likewise the rescue developer applied and succeeded in striking out both the 50 Suit as well as 51 Suit and their respective statement of
I claim filed thereunder.

**[11]** As the result, the original developer filed Appeal 19 against the purchasers and the purchasers filed Appeal 2 and Appeal 3 against the rescue developer and the original developer respectively.

**[12]** All three Appeal 19, Appeal 2 and Appeal 3 ('appeals') that were filed came before me and they were by consensus heard together. After having read the appeal records and written submissions of the parties, I heard oral arguments of counsel on 17 April 2018 and 14 May 2018. I thereafter adjourned my decision to deliberate on the arguments put forth by counsel.

**[13]** Now having done so, I hereby give my decision below with the supporting grounds.

BRIEF FACTS

**[14]** The purchasers on different dates in the second half of 1997 entered into sale and purchase agreement ('SPA') respectively with the original developer to purchase a double storey medium cost house at Taman Pekatra, Simpang Ampat, Pulau Pinang.

**[15]** The material term in the SPA is as follows:

> 20. MASA UNTUK MENYERAHKAN PEMILIKAN KOSONG
>
> (1) Bangunan tersebut hendaklah disiapkan oleh Penjual dan pemilikan kosong bersama dengan bekalan air dan elektrik sedia untuk disambungkan ke Bangunan tersebut, hendaklah diserahkan kepada Pembeli dalam tempoh dua puluh empat (24) bulan kalendar dari tarikh permulaan kerja pembangunan di tapak hendaklah dimulakan dan dijalankan oleh Penjual dalam tempoh 12 bulan dari tarikh Perjanjian ini.
>
> (2) Sekiranya Penjual gagal menyerahkan pemilikan kosong Bangunan tersebut, berserta dengan bekalan air dan elektrik sedia untuk disambungkan ke bangunan tersebut pada masa yang tepat, maka Penjual hendaklah dengan serta merta membayarkan kepada Pembeli ganti rugi jumlah tertentu yang dikira dari hari ke hari dengan kadar sepuluh peratus (10%) setahun daripada harga beli.

**[16]** The original developer failed to complete and handover the respective houses to the purchasers within the contractually stipulated 24 months.

**[17]** In fact the original developer ran into difficulty in completing the houses and later sought the help of the rescue developer to complete them.

**[18]** The houses were finally completed by the rescue developer in 2011 and vacant possession was thereafter given to the purchasers.

A CONTENTIONS AND FINDINGS

**[19]** The sole pivotal contention of the original developer is that the suits were time barred by reason that they were filed beyond the time expiry provided in s 6 of the Limitation Act 1953. Likewise, the rescue developer adopted the same contention as well as there was no privity of contract with the purchasers. They principally rely on the case of *Insun Development Sdn Bhd v Azli bin Bakar* [1996] 2 MLJ 188 (FC).

**[20]** However, the purchasers counter contended that the suits were filed within time by reason that time for purposes of limitation only commenced when vacant possession of the houses were given in 2011. Consequently, they filed their suits well within time. They relied on the case of *Golden Approach Sdn Bhd v Lau Seng Leong & Anor* [2019] 3 MLJ 777; [2018] AMEJ 0342.

**[21]** These are interlocutory appeals from the sessions court, thus they are dealt by way of re-hearing afresh following O 55 rr 2 and 5 of the Rules of Court 2012 read together; see also para 55/2/1 of the *Malaysian Civil Procedure* 2015 Vol 1.

**[22]** The law on striking out under O 18 r 19 of the Rules of Court 2012 is trite and settled. It is needful to just refer to three appellate court cases.

**[23]** First and foremost in *Bandar Builders Sdn Bhd v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 (SC) Mohamed Dzaiddin SCJ (later CJ) held as follows with emphasis added by me:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. *It is only in plain and obvious cases that recourse should be had to the summary process under this rule* (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson Heywood & Clark Ltd 7*), *and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'* (see *AG of Duchy of Lancaster v L & NW Rly Co 8*). *It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence* (see *Wenlock v Moloney & Ors 9*). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari materia with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd 7*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

**[24]** Next, Zulkefli Makinudin FCJ (now PCA) held as follows in *Boo Are Ngor (p) v Chua Mee Liang (p) (sued as public officer of Kim Leng Tze Temple)* [2009] 6 MLJ 145; [2009] 6 CLJ 617 (FC):

[8] It is our view that O 18 r 19(1) of the RHC 1980 does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial (see the case of *Bank Bumiputra Malaysia Berhad & Anor v Lorrain Esme Osman & Ors* [1987] 2 MLJ 633; [1987] CLJ (Rep) 472). Since the second suit has not been set down for trial, the defendant in the present case in our view can still apply to strike out the second suit on the ground of abuse of the process of the court.

**[25]** Finally in *Khairy Jamaluddin v Dato' Seri Anwar bin Ibrahim* [2013] 4 MLJ 173; [2013] 6 CLJ 849 (CA), Anantham Kasinather JCA held as follows with emphasis added by me:

[13] The Court of Appeal in England in the case of *European Asian Bank AG v Punjab and Sind Bank* [1983] 2 All ER 508 opined that, in an appropriate case, a court of law should decide a point of law in O 14 proceedings even: 'if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand'. Our Supreme Court in the case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ Rep 14; [1992] 1 CLJ 627 accepted this proposition of law as good law through the judgment of Mohamed Azmi FCJ (as he then was) when His Lordship said:

> *Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand* (see *Cow v Casey* and *European Asian Bank AG v Punjab & Sind Bank* at p 516).

[14] *In our judgment, the aforesaid principle of law pronounced by our Supreme Court in Bank Negara Malaysia v. Mohd Ismail & Ors is not limited in its application to O 14 proceedings but extends to applications under O 18 r 19. We opine to this effect because both applications are summary in nature.* ... In other words, according to the submission of counsel, it is unarguable that these obiter remarks once admitted are conclusive of the defence of justification to the respondent's claim based on slander and libel.

**[26]** As far as limitation is concerned, s 6 of the Limitation Act 1953 provides as follows:

*6 Limitation of actions of contract and tort and certain other actions*

(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —

(a) actions founded on a contract or on tort;

A (b) actions to enforce a recognisance;

(c) actions to enforce an award;

(d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

B

The accrual of the cause of action especially for breach of contract has been explained in *Nasri v Mesah* [1971] 1 MLJ 32 (FC) where Gill FJ succinctly held as follows:

C A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown* (1888) 22 QBD 128 131). In *Reeves v Butcher* (1891) 2 QB 590 511 Lindley LJ said:

D This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* LR 4 QB 509; 511, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

E

*In Board of Trade v Cayzer, Irvine & Co* [1927] AC 610; 617. Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, F therefore, time runs from breach (per Field J. in *Gibbs v Guild* 8 QBD 296; 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see Bolo's case LR 57 IA 74). It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same G thing when one speaks of the time from which the period of limitation as prescribed by law should run.

**[27]** In *Insun Development Sdn Bhd v Azli bin Bakar* the Federal Court had to consider whether the purchaser's right to sue for the agreed liquidated H damages accrued the day after the time limited under the agreement for delivery of vacant possession or it accrued upon actual delivery of vacant possession. Edgar Joseph Jr FCJ held as follows with emphasis added by me:

(18) (The agreement was dated 12 December 1984 and by cl 18 thereof, it was I provided as follows:

(1) The said building shall be completed by the vendor and vacant possession delivered to the purchaser within twenty-four (24) calendar months from the date of this agreement.

(2) If the vendor fails to deliver vacant possession of the said building in time the

vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10) per annum of the purchase price.

It was common ground that the house was not completed and available for delivery until 25 March 1994, and that there had thus been a delay from 12 December 1986 until 25 March 1994 on the part of the vendor in delivering vacant possession of the same.

A demand for agreed liquidated damages by the purchaser having been refused by the vendor, the former commenced proceedings by way of the originating summons aforesaid for the declarations aforesaid and for consequential reliefs.

The vendor's defence was that the purchaser's claim was barred by s 6(1) of the Limitation Act 1953. More particularly, it was contended that as the purchaser's claim was founded upon a breach of contract, that is to say, of cl 18, his cause of action accrued on the day following the time limited under the agreement for completion and delivery of vacant possession of the house. On this view, the purchaser had commenced the proceedings aforesaid more than seven months out of time and his claim was therefore barred by limitation.

...

The crucial question is: regard being had to the provisions of cl 18 of the agreement, when did the purchaser's right to sue for the agreed liquidated damages for the delay accrue?

It is clear law that in the absence of express contractual provision, the purchaser's right to sue for damages would accrue on the date of the breach of contract (see *Nasri v Mesah* [1971] 1 MLJ 32 at p 34; *Reeves v Butcher* [1891] 2 QB 509 at p 511; *Gibbs v Guild* (1881–1882) 8 QBD 296 at p 302). But, the parties to a contract are free to regulate or modify their rights in the event of breach thereof in such a manner as to postpone the date of accrual of their right to sue for damages which, of course, was what had happened in *Loh Wai Lian*.

In the present context, we have to consider whether there is any, and if so what, material difference between the contract of sale in *Loh Wai Lian* and the agreement here.

The obvious difference between the contract of sale in *Loh Wai Lian* and the agreement here which we consider to be most material is this: under the former, the statutory formula for the calculation of the indemnity was modified by expressly stating not only the terminus a quo(the opening date) but also the terminus ad quem(the closing date), which was the date of actual completion and delivery of possession, whereas under the latter — although there is, by cl 18(2), also a formula for the calculation of liquidated damages — it only specifies the terminus a quo but not the terminus ad quem. In our view, this difference is a matter of critical substance.

It is obvious from the judgment of the Privy Council in *Loh Wai Lian* that but for the unusual language of cl 17 of the contract of sale, which had provided a formula for the computation of damages payable by the developer to the buyer for delay, by defining not merely the terminus a quo(the opening date) required under r 12(1)(r)

of the 1970 Rules but also the terminus ad quem (the closing date) — not required under r 12(1)(r) – the case would have been differently decided, for their Lordships said this (at p 4):

> If the question is asked 'in the absence of such an express provision when would the purchaser's right of action for damages for breach of contract accrue?', the answer is plainly the date on which the breach occurred. But parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided. This appeal raises no point of principle but simply a question of what is the true construction of the contract in which the parties entered.

In our view, for the reasons stated *Loh Wai Lian* is, therefore, readily distinguishable from the present case and accordingly, the judge was, with respect, wrong in holding that it was of decisive importance to the question which arose for decision.

*It follows, therefore, that our answer to the crucial question aforesaid is: because the agreement by cl 18(2) had provided for a formula for the calculation of liquidated damages which defined the terminus a quo(the opening date) but not the terminus ad quem(the closing date), the purchaser's right of action for damages for breach of contract — following the general rule — accrued on the date of the breach which, in this case, was the day after the time limited under cl 18(2) for the delivery of vacant possession, that is to say, on 12 December 1986. Accordingly, the purchaser, having commenced proceedings only on 31 July 1993, was more than seven months out of time. We are thus driven to the inevitable conclusion that the purchaser's claim was statute-barred under the provisions of* s 6(1) of the Limitation Act 1953.

**[28]** It is therefore a question of construction of the contract in issue. On my reading of cl 20(1) and (2) of the SPA, it is plain that only the opening date but not the closing date was specified. It is in other words similar to that in *Insun Development Sdn Bhd v Azli bin Bakar*.

I observed that *Insun Development Sdn Bhd v Azli bin Bakar* was followed subsequently in *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293 (CA), *Abdul Aziz bin Abdul Hamid dan 26 orang lain v Perak Roadways Berhad* [2006] MLJU 481, *Faber Union Sdn Bhd v Goodaim Realty Sdn Bhd* [2010] MLJU 608, *Perbadanan Kemajuan Negeri Perak v Rama Rao a/l Ramasamy @ Ramaiah* [2011] MLJU 1287 and *Tenaga National Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749 (FC).

**[29]** It is therefore clear that the suits which were all filed in 2016–2017 were caught by limitation which expired in 2006. In the circumstances herein, the purchasers ought to have filed their suits once in 2006 before limitation set in for delay damages accrued to that point and further suits after 2011 for the balance of the delay damages although it may seem cumbersome in so doing. The purchasers referred to *Golden Approach Sdn Bhd v Lau Sen Leong & Anor*

in attempt to distinguish *Insun Development Sdn Bhd v Azli bin Bakar* to escape from their predicament. I have carefully read the case but am unable to agree it was correctly distinguished. The material clause in issue similarly did not stipulate the closing date. In any event I am, with respect, not bound by that decision. The purchasers further referred to *Kamarul Ariffin Jait & Ors v Zuraini Osman* [2016] MLRHU1 but again on careful reading, I find that the facts are wholly distinguishable. The purchasers here were not under disability at all material times to have commenced their suit by 2006.

**[30]** Consequently, it is plain and obvious that the suits against the original developer ought to be struck out following *Tan Sri Dato' Eric Chia Eng Hock v NKK Corporation (Japan)* [2004] MLJU 293; [2004] 7 CLJ 137 where Mohd Hishamuddin bin Mohd Yunus J (later JCA) held as follows with emphasis added by me:

> I have dismissed the plaintiff's appeal with costs. With respect, I accept the defendant's argument. In my judgment, by reason of s 6(1)(a), the present suit, filed on October 2, 2002, is out of time by a year and is thus frivolous, vexatious and an abuse of the process of the court. In *Ronex Properties Ltd v John Laing Construction Ltd & Ors* [1982] 3 All ER 961, the English Court of Appeal held (at p 968):
>
> > *Where it is thought to be clear that there is a defence under the Limitation Act*, the defendant can either plead that defence and seek the trial of a preliminary issue, or *in a very clear case, he can seek to strike out the claim on the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence*.
>
> The above decision has been followed by the Brunei High Court in *Zainuddin Dato Seri Paduka Hj Marsal v Pengiran Putera Negara Pengiran Hj Umar* [1997] 4 MLJ 135; [1997] 4 CLJ 233.
>
> I have no doubt whatsoever that the present case is a 'very clear case' (to borrow the phrase in *Ronex Properties*) of the plaintiff's action being out of time, because the plaintiff unequivocally concedes that the suit was filed seven years after the publication of the allegedly defamatory letter.

**[31]** As for the rescue developer, the purchasers were not able to show by tendering cogent evidence that they respectively entered into a new contract with the rescue developer or that the SPA was novated over to the rescue developer. In *Woolley Development Sdn Bhd v Tiara Contours Construction Sdn Bhd* [2015] MLJU 1288; [2016] 2 CLJ 610 (CA) Nallini Pathmanathan JCA held as follows with emphasis added by me:

> [53] In the instant case, the second defendant was not party to, nor privy to the sale and purchase agreement which was concluded between the plaintiff and Cherating. As such, the plaintiff could not seek to enforce the settlement agreement against a non-party, namely the second defendant. *The successor-in-title clause did not have the effect of allowing the second defendant to step into the shoes of Cherating for the reasons*

A *cited above. Accordingly it was not possible for the plaintiff to seek to enforce the sale and purchase agreement or the settlement agreement against the second defendant, who was a stranger to both agreements.*

...

B [60] *In Woolley Development Sdn Bhd v Stadco Sdn Bhd* [2011] 6 MLJ 121; [2010] 7 CLJ 73 this court reversed the decision of the High Court which had granted an injunction restraining, inter alia, *Woolley Development* from dealing with some lands forming the subject matter of 192 sale and purchase agreements made between the plaintiff there and Cherating. *In setting aside the interlocutory injunction this court held, inter alia, that as there was never any contract between the second defendant there,*
C *namely Woolley Development and the plaintiff there. As stated in that case: ... In basic legal terms, there was never in existence any privity of contract between them.*

[61] In these circumstances, we were satisfied that the second defendant could not and was not a successor-in-title to Cherating, and could not therefore be held liable to the plaintiff for the breaches occasioned by Cherating.

D

Put simply, the purchasers could only sue the original developer but not the rescue developer. I noticed that this was also the position decided in *Abdul Raouf Ab Rahman & Ors v Petplus (M) Sdn Bhd & Ors* [2013] 1 LNS 1314
E (CA) that involved a rescue developer cum turnkey contractor too.

**[32]** In the premises, it is again plain and obvious that the Suit ought to be struck out because of absence of privity of contract between the parties. I have earlier in *Veeriyah a/l Gothandabani v Majestic Heights Sdn Bhd (in liquidation)*
F *& Ors* [2017] MLJU 1148; [2017] 1 LNS 1158 similarly struck out one of the defendants therein for want of privity of contract.

CONCLUSION

G **[33]** Though I sympathise with the plight of the purchasers, I am however bound by law that has been developed by cases of higher authority. I am nonetheless mindful that the purchasers also referred to the Federal Court Case of *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113; [1995] 2 MLRA 461 that the doctrine of estoppel may be applied to prevent or
H preclude a litigant from raising the provisions of a statute in answer to a claim against him in circumstances where it would be unjust or inequitable for him to do so. This is fact sensitive and I am of the opinion the doctrine is not applicable here because that the original developer had not committed any act akin to constructive or equitable fraud. Based on the law as it stands, the Suits
I are obviously bound to fail.

**[34]** For the foregoing reasons, Appeal 2 is dismissed. Likewise Appeal 3 is dismissed. Appeal 19 is however allowed. There shall be no order as to costs here and below.

*Order accordingly.*

Reported by Mohd Kamarul Anwar